

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO**  
Bankruptcy Judge Sid Brooks

|                          |   |                          |
|--------------------------|---|--------------------------|
| In re:                   | ) |                          |
|                          | ) |                          |
| JOHNNY D. HAMILTON       | ) | Bankruptcy Case No.      |
| SUZANNA B. HAMILTON,     | ) | 04-13338-SBB             |
|                          | ) | (Chapter 7)              |
| Debtors.                 | ) |                          |
| _____                    | ) |                          |
|                          | ) |                          |
| BANK ONE DELAWARE, N.A., | ) |                          |
| f/k/a First USA,         | ) |                          |
| Plaintiff,               | ) |                          |
|                          | ) |                          |
| v.                       | ) | Adversary Proceeding No. |
|                          | ) | 04-1560-SBB              |
| JOHNNY D. HAMILTON,      | ) |                          |
|                          | ) |                          |
| Defendant.               | ) |                          |

**MEMORANDUM OPINION AND ORDER**

THIS MATTER comes before the Court on the Motion to Dismiss Adversary Proceeding for Failure to State a Claim upon Which Relief Can Be Granted, Pursuant to FED.R.CIV.P. 12(b)(6), FED.R.BANKR.P. 7056 and Request for Attorney Fees ("Motion") filed by Johnny D. Hamilton ("Defendant") on June 23, 2004 (Docket # 5) and the letter response thereto filed by the Bank One Delaware, N.A., f/k/a First USA ("Plaintiff") on July 12, 2004 (Docket # 8). The Court, having reviewed the file and being advised in the premises, makes the following findings, conclusions and Order.

**I. FINDINGS**

Plaintiff filed its Complaint on May 26, 2004 objecting to the dischargeability of a debt owed to it by the Defendant pursuant to 11 U.S.C. § 523(a)(2). Overall, the quality of Plaintiff's Complaint is poor. It is incomplete, imprecise (with respect to fraud allegations) and inaccurate and exposes the Plaintiff to the type of relief sought in the Defendant's Motion.

In a nutshell, it is alleged that the Defendant had a charge account with the Plaintiff. It is alleged in paragraphs 7-9 of the Complaint that:

7. Defendant incurred charges and cash advances on this account totaling \$13,716.42, including interest, as of 02/26/2004, the date the bankruptcy petition was filed.



8. This account was opened 11/26/2003
9. Between 12/02/2003 and 12/03/2003, Defendant incurred \$13,500.00 in cash advance and/or convenience check charges.
10. Defendant's debt is a "consumer debt", as defined by 11 U.S.C. § 101(8).
11. By obtaining and/or accepting an extension of credit from Plaintiff and incurring charges on the account, Defendant represented an intention to repay the amounts charged.
12. Plaintiff reasonably relied on the representations made by Defendant.
13. Defendant incurred the debts when Defendant had no ability or objective intent to repay them.
14. Defendant obtained credit extended from Plaintiff by false pretenses, false representations and/or actual fraud.

The Defendant filed the Motion in response to the Plaintiff's Complaint. Pursuant to Rule 7012(b), Fed.R.Bankr.P.,

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

By this Court's Order of June 24, 2004, this Court found that the request for dismissal included consideration of "matters outside the pleading" and, therefore, the Defendant's Motion would be treated as one for summary judgment and disposed of as provided in Rule 56. The Court further ordered that the Plaintiff file a brief in response, and appropriate materials, if any, on or before July 12, 2004.

The Defendant asserts in his Motion and the affidavit attached thereto that the Defendant was solicited by the Plaintiff to make a balance transfer of his account with another credit card company to the Plaintiff on December 2, 2003. (Motion at paragraph 4; Exhibit A to the Motion



at paragraph 4.) On that same day he transferred his balance to the Plaintiff. (*Id.*) Moreover, he filed for relief under Chapter 7 on February 26, 2004, some 86 days after the balance transfer and he states that he did not consult bankruptcy counsel until late January of 2004. (Motion, paragraphs 4-7, Exhibit A to the Motion at paragraphs 4, 5, 14 and 15.) The Plaintiff also attaches exhibits to his Motion of his credit card statements which are uncontroverted by the Plaintiff and show that Defendant did not make any charges or receive cash from the Plaintiff within 86 days of the filing or within the presumptive period of 60 days. (Exhibit B to the Motion.) Defendant also seeks attorney fees by his Motion.

On July 12, 2004, the Court received a letter response from the Plaintiff. The letter response did not dispute the statement of facts, statement of law, argument and relief sought by the Motion. The letter response merely indicated that a settlement was reached and the parties needed time to submit the same to the Court. The Plaintiff did not request an extension of time in which to file a response to the Motion nor did it request that this Court hold this matter in abeyance. To date, nothing further has been filed in this matter.

## II. DISCUSSION

### A. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is to be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56 (made applicable to adversary proceedings by FED.R.BANKR.P. 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). This Court will review the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party—here Plaintiff. *Koch v. Koch Industries*, 203 F.3d 1202, 1212 (10th Cir. 2000).

### B. ANALYSIS

#### 1. 11 U.S.C. § 523(a)(2) Components

Plaintiff's Complaint seeks relief under "11 U.S.C. § 523(a)(2)." The Plaintiff makes *no* attempt to define under what subsection of section 523(a)(2) it is proceeding (i.e. section 523(a)(2)(A), (B) or (C)). There are no allegations asserting a use of a "writing," so this Court would conclude that the applicable subsections under which Plaintiff is proceeding are 11 U.S.C. §§ 523(a)(2)(A) and/or (C).



2. 11 U.S.C. § 523(a)(2)(A) "Fraud"

In paragraph 14, Plaintiff alleges fraud. Fraud must be pled with particularity pursuant to FED.R.CIV.P. 9(b). Fraud is *not* pled with particularity. Thus, Plaintiff's Complaint, to the extent it seeks a denial of dischargeability of the debt for *fraud* fails.

3. 11 U.S.C. § 523(a)(2)(A) "Justifiable Reliance"

Plaintiff states in paragraph 12 of the Complaint that "Plaintiff *reasonably* relied on the representations made by Defendant." This would seem to implicate section 523(a)(2)(A), but the "reasonable reliance" standard utilized by the Plaintiff is a standard that has not been used for nine years. Section 523(a)(2)(A) provides that "a debt may not be discharged "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition..." The Supreme Court ruled that a debt will be nondischargeable under § 523(a)(2)(A) if the creditor "*justifiably relies*" rather than "reasonably relies" on the debtor's fraudulent misrepresentations. *Field v. Mans*, 516 U.S. 59, 73-75, 116 S.Ct. 437, 445-46, 133 L.Ed.2d 351 (1995). The Code requires actual and justifiable, but not reasonable, reliance on fraudulent misrepresentation in order for the plaintiff to recover. This is a softer, less demanding standard.

Plaintiff must prove each element necessary to prevent discharge pursuant to Section 523(a)(2)(A). These elements are:

- (a) Debtor/Defendant made a false representation or willful misrepresentation;
- (b) the representation was made with the intent to deceive Plaintiff;
- (c) Plaintiff relied on the representation;
- (d) Plaintiff's reliance was justified; and
- (e) Plaintiff sustained a loss as a result of Debtor/Defendant's representation.

1516 U.S. at 73-75, 116 S.Ct. at 446.

Plaintiff must have been justified in relying on a defendant's representations. "And in this regard, the standard of 'justified reliance' is not whether a reasonably prudent man would be justified in relying, but whether the particular individual had the ability and right to so rely." *Id.* The reasonableness of the reliance has not become wholly irrelevant, however,

for the greater the distance between the reliance claimed and the limits of the reasonable, the greater the doubt about reliance in fact. [Creditor] may recover, at common law and in bankruptcy, but lots of creditors are not at all naive. The subjectiveness of justifiability cuts both ways, and reasonableness goes to the probability of actual reliance.



The Defendant's affidavit refutes "justifiable reliance"—or, for that matter, "reasonable reliance"—on the part of the Plaintiff. (Exhibit A to the Motion, paragraphs 4,5, 12-14.) The Plaintiff does not submit countervailing affidavits or documentary evidence to contradict the affidavit.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provide in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment , if appropriate, shall be entered against the adverse party

FED.R.CIV.P. 56(e). Because Plaintiff does not contradict the Defendant's affidavit with respect to the reliance element, this Court cannot conclude that the Plaintiff "justifiably relied" on the representations made by the Defendant. Therefore, Plaintiff's Complaint will be dismissed to the extent relief is sought under 11 U.S.C. § 523(a)(2)(A).

4. 11 U.S.C. § 523(a)(2)(C)

From all appearances, paragraph 9 of the Complaint would lead this Court to believe that the Defendant went on a spending spree on December 2 and 3, 2003, incurring \$13,500.00 in "cash advances and/or convenience check charges." The Defendant, in his affidavit, signed under oath and attached to the Defendant's Motion, states that the \$13,500.00 was a *balance transfer*. This contradicts the assertion by the Plaintiff. This affidavit is not refuted by the Plaintiff by a countervailing affidavit or otherwise.

Moreover, this Court would conclude from the limited documentary evidence before it, that the Defendant did not incur any charges other than a \$35.00 late fee from, at least, December 18, 2003 to the date of the filing of the petition. In accordance with *In re Poor*, 219 B.R. 332, 336 (Bankr.D.Maine 1998)<sup>1</sup> and the facts and circumstances of this case, this Court concludes the balance transfer does not constitute a cash advance for the purpose of 11 U.S.C. § 523(a)(2)(C). Therefore, Plaintiff's Complaint will be dismissed to the extent relief is sought under 11 U.S.C. § 523(a)(2)(C).

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<sup>1</sup> The Court in *In re Poor* concluded that debtor's use of a credit card to pay off a different card with a balance transfer did not qualify as a "cash advance" within the meaning of 11 U.S.C. § 523(a)(2)(C). 219 B.R. 332, 336-38.



5. Attorney Fees and Costs

Pursuant to 11 U.S.C. § 523(d):

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Plaintiff and counsel for the Plaintiff are not strangers to this Court. Counsel has filed many adversary proceedings seeking a determination of nondischargeability related to credit card debts. Most, if not all, have settled and few, if any, have gone to trial. The Complaint filed herein is deficient in many respects and appears to be filed to force a settlement or payment of the claim. The Complaint filed herein is in the template format used in most, if not all, of Mr. Cleverley's filed adversary proceedings. (Appendix A & B attached hereto.) Counsel is put on notice that, for the reasons set forth herein, this practice is not acceptable and will not be tolerated in the future.

The Court concludes that an award of costs and a reasonable award of attorney's fees is warranted in this case. Therefore, the Defendant shall have 20 days from the date of this Order and separate Judgment to file a request for attorney fees and costs. Plaintiff shall thereafter have 20 days to file a response to the Defendant's request.

**III. ORDER**


For the reasons set forth above,

IT IS ORDERED that Defendant's Motion is GRANTED and the within adversary proceeding is DISMISSED.

IT IS FURTHER ORDERED that the Defendant may file a request for attorney fees and costs within 20 days after entry of this Order and separate Judgment. Plaintiff shall thereafter have 20 days to file a response to the Defendant's request.

Dated this 4th day of August, 2004.

BY THE COURT:



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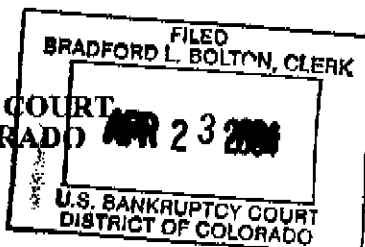
Sidney B. Brooks,  
United States Bankruptcy Judge



## APPENDIX A



UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
AT DENVER



In re:

[REDACTED]

Debtor.

Bank One Delaware, NA f.k.a. First USA,

Plaintiff,

v.

[REDACTED]

Defendant.

Bankruptcy Case No. [REDACTED]

COMPLAINT OBJECTING TO  
DISCHARGEABILITY OF  
INDEBTEDNESS  
(11 U.S.C. § 523)

COMES NOW Plaintiff, by and through its attorney of record, Matthew R. Cleverley,  
to allege and complain as follows:

I. PARTIES AND JURISDICTION

1. Plaintiff is a foreign corporation licensed to do business in the State of Colorado with all fees and licenses paid, and otherwise is entitled to bring this action.
2. Defendant filed a Chapter 7 bankruptcy petition on [REDACTED]
3. Jurisdiction is vested in this proceeding pursuant to 28 U.S.C. § 157, 28 U.S.C. § 1334, and 11 U.S.C. § 523; this proceeding is a core matter.
4. Plaintiff is a creditor in this bankruptcy proceeding.

II. CAUSE OF ACTION

5. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1 through 4, above.
6. Defendant had a charge account with Bank One Delaware, NA f.k.a. First USA,  
Account No. [REDACTED]



7. Defendant incurred charges and cash advances on this account totaling \$22,426.12, including interest, as of 02/03/2004, the date the bankruptcy petition was filed.
8. This account was opened 02/01/1985.
9. Between 09/15/2003 and 09/16/2003, Defendant incurred \$6,000.00 in cash advance and/or convenience check charges.
10. Defendant's debt is a "consumer debt", as defined by 11 U.S.C. § 101(8).
11. By obtaining and/or accepting an extension of credit from Plaintiff and incurring charges on the account, Defendant represented an intention to repay the amounts charged.
12. Plaintiff reasonably relied on the representations made by Defendant.
13. Defendant incurred the debts when Defendant had no ability or objective intent to repay them.
14. Defendant obtained credit extended from Plaintiff by false pretenses, false representations and/or actual fraud.
15. As a result of Defendant's conduct, Plaintiff has suffered damages in the amount of \$6,000.00.
16. Pursuant to 11 USC § 523(a)(2), Defendant should not be granted a discharge of this debt to the Plaintiff in the amount of \$6,000.00.

### **III. PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court grant the following relief:


1. A monetary judgment against Defendant in the amount of \$6,000.00 plus accrued interest at the contractual rate from and after 02/03/2004, plus



additional interest at the contractual rate, which will continue to accrue until the date of judgment herein;

2. An order determining that such debt is non-dischargeable under 11 USC § 523(a)(2);
3. An order awarding Plaintiff its attorneys' fees and costs incurred herein; and
4. An order awarding Plaintiff such additional relief as this Court deems just and equitable.

DATED April 21, 2004.

  
\_\_\_\_\_  
Attorney for Plaintiff  
Matthew R. Cleverley  
McKinstry & Division Law Firm  
P.O. Box 987  
Suquamish, WA 98392  
Phone: 360-598-4952

I certify that I am admitted to the U.S. District Court for the District of Colorado pursuant to L.B.R. 910.

  
\_\_\_\_\_  
Matthew R. Cleverley



## APPENDIX B



UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
AT DENVER

2009 JUN 14 AM 11:32

In re:

[REDACTED]

Debtor.

Bank One Delaware, NA f.k.a. First USA,

Plaintiff,

v.

[REDACTED]

Defendant.

Bankruptcy Case No. [REDACTED]

B

ADV. NO.

COMPLAINT OBJECTING TO  
DISCHARGEABILITY OF  
INDEBTEDNESS  
(11 U.S.C. § 523)

COMES NOW Plaintiff, by and through [REDACTED] Record, Matthew R. Cleverley,

to allege and complain as follows:

**I. PARTIES AND JURISDICTION**

1. Plaintiff is a foreign corporation licensed to do business in the State of Colorado with all fees and licenses paid, and otherwise is entitled to bring this action.
2. Defendant filed a Chapter 7 bankruptcy petition on [REDACTED].
3. Jurisdiction is vested in this proceeding pursuant to 28 U.S.C. § 157, 28 U.S.C. § 1334, and 11 U.S.C. § 523; this proceeding is a core matter.
4. Plaintiff is a creditor in this bankruptcy proceeding.

**II. CAUSE OF ACTION**

5. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1 through 4, above.
6. Defendant had a charge account with Bank One Delaware, NA f.k.a. First USA,  
Account No. [REDACTED].



7. Defendant incurred charges and cash advances on this account totaling \$16,267.49, including interest, as of 03/09/2004, the date the bankruptcy petition was filed.
8. This account was opened 09/16/2002.
9. Between 11/13/2003 and 01/07/2004 Defendant accumulated \$565.00 in retail charges.
10. Between 11/13/2003 and 01/07/2004, Defendant incurred \$7,150.00 in cash advance and/or convenience check charges.
11. Defendant's debt is a "consumer debt", as defined by 11 U.S.C. § 101(8).
12. By obtaining and/or accepting an extension of credit from Plaintiff and incurring charges on the account, Defendant represented an intention to repay the amounts charged.
13. Plaintiff reasonably relied on the representations made by Defendant.
14. Defendant incurred the debts when Defendant had no ability or objective intent to repay them.
15. Defendant obtained credit extended from Plaintiff by false pretenses, false representations and/or actual fraud.
16. As a result of Defendant's conduct, Plaintiff has suffered damages in the amount of \$7,715.00.
17. Pursuant to 11 USC § 523(a)(2), Defendant should not be granted a discharge of this debt to the Plaintiff in the amount of \$7,715.00.

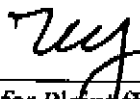
### **III. PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court grant the following relief:




1. A monetary judgment against Defendant in the amount of \$7,715.00 plus accrued interest at the contractual rate from and after 03/09/2004, plus additional interest at the contractual rate, which will continue to accrue until the date of judgment herein;
2. An order determining that such debt is non-dischargeable under 11 USC § 523(a)(2);
3. ~~An order awarding Plaintiff its attorneys' fees and costs incurred herein; and~~
4. An order awarding Plaintiff such additional relief as this Court deems just and equitable.

DATED June 9, 2004.

  
\_\_\_\_\_  
Attorney for Plaintiff  
Matthew R. Cleverley  
McKinstry & Division Law Firm  
P.O. Box 987  
Suquamish, WA 98392  
Phone: 360-598-4952

I certify that I am admitted to the U.S. District Court for the District of Colorado pursuant to L.B.R. 910.

  
\_\_\_\_\_  
Matthew R. Cleverley